Filed 12/15/09 P. v. Acosta CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. LEONARD ACOSTA, JR., Defendant and Appellant.	E046677 (Super.Ct.No. BAF005286) OPINION

APPEAL from the Superior Court of Riverside County. Elisabeth Sichel, Judge. Affirmed.

David L. Polsky, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Arlene Aquinty Sevidal and Kristine A. Gutierrez, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant Leonard Acosta, Jr., of corporal injury on a spouse resulting in a traumatic condition (count 1—Pen. Code § 273.5, subd. (a))[1] and assault with a deadly weapon (count 2—§ 245, subd. (a)(1)). In a bifurcated proceeding thereafter, the court found true allegations that defendant had suffered two prior serious felony convictions and three prior strike convictions. The court sentenced defendant to an aggregate term of 35 years to life. On appeal, defendant makes two contentions: (1) the trial court erred in admitting evidence of defendant's prior act of domestic violence, and (2) insufficient evidence supports the finding that defendant used a deadly weapon. Finding no error we affirm the judgment in full.

FACTUAL AND PROCEDURAL HISTORY

On January 28, 2007, the victim, defendant's spouse, went to the hospital in the late afternoon due to pain in her left forearm. Her left forearm and wrist were swollen and she had a small bruise on her left cheek. She informed a nurse that she incurred the injury to her arm when defendant threw a flashlight at her. As a mandated reporter the nurse called the police. The victim subsequently informed the physician's assistant who examined her that she incurred the injury when defendant threw a flashlight at her. An X-ray of the victim's arm revealed a fracture or break through the bone of her left arm. The hospital personnel treated the victim's arm by casting the forearm and placing her arm in a sling.

[1] All further statutory references are to the Penal Code unless otherwise indicated.

A police officer was dispatched to the hospital in regards to the purported act of domestic violence. He contacted the victim, whom he described as upset, shaking, and crying. The victim told the officer that she and defendant had engaged in an argument that morning during which defendant "threw a large, black metal flashlight at [her]." The victim raised her arms in an effort to block it from hitting her face and the flashlight hit her left forearm and cheek. She told the officer she waited five hours before going to the hospital because she did not want defendant to know she was going. She informed the officer she wanted defendant prosecuted. The victim told the officer that defendant had previously punched her in the face in October 2006; however, she did not report that incident to the police because she was afraid defendant would hurt her. The officer informed her that she could obtain a restraining order against defendant.[2] As the victim left the hospital, she told her cousin that she was injured when defendant threw a flashlight at her.

On February 1, 2007, the victim applied for a temporary restraining order against defendant. In the application she declared under penalty of perjury that defendant fractured her left arm and bruised her face by throwing a flashlight at her. She also declared that he had previously punched her in the face on October 10, 2006, after which

[2] The victim testified that the officer told her she had to follow through and report everything to Child Protective Services (CPS) or else they would take away her children. She testified that someone from CPS contacted her at the hospital and informed her that she had to file for a restraining order and for divorce or they would take her children away from her. The officer testified he did not contact CPS, did not feel their involvement was warranted under the circumstances, and at no time saw anyone from CPS interact with the victim while he was at the hospital.

she incurred a "[s]wollen right eye and cheek, bruised right eye [that] spread to the bridge of the nose and the left eye." The court granted the temporary restraining order. The victim later applied for a permanent restraining order. In the latter application, she reiterated both occurrences of domestic violence as contained in her original application, again, under penalty of perjury. In March 2007, the victim appeared in court and related the October 2006 incident of abuse under oath. The permanent restraining order was issued. The victim also filed for divorce and requested sole custody of the children due to defendant's incidents of domestic violence.

At trial, the victim testified that all her previous reports of violence at the hands of defendant were lies. Rather, she testified that on the date of the incident she was pregnant, jealous, and insecure. She suspected defendant of having an affair. Defendant was roughhousing with her son and caused the latter to start crying. The victim became upset and accused defendant of doing it purposefully. Defendant started packing his belongings; he said she was not making him happy anymore and that he was leaving. The victim attempted to stop him from packing his things. She yelled at him, begging him not to leave. When he continued to pack, she lunged at him and grabbed him by the neck. He pushed her hands aside. He never threw anything at her. Upset, she ran into the bathroom where she slammed her arms down on the vanity. As she exited the bathroom, defendant hugged her and she apologized to him.

The victim noticed the pain in her forearm a few hours before she went to the hospital. She lied about the cause of her injury because she was afraid she would get into trouble. She was also afraid that if she told the truth she would lose her job as a childcare

worker She filed for the restraining orders and for divorce only because she was afraid that otherwise she would lose her children. She testified that she still loved defendant.

DISCUSSION

A. Admissibility of Prior Act of Domestic Violence

Defendant contends that the court erred in permitting the prosecution to adduce evidence that defendant had committed a prior act of domestic violence. He maintains that the evidence of the October 2006 incident was more prejudicial than probative. The People contend defendant waived this claim by explicitly conceding to its admissibility below. We agree with the People; however, to forestall defendant's ineffective assistance of counsel claim, we shall address the issue on the merits.

Prior to trial the People filed a motion in limine specifically seeking to admit evidence of defendant's prior act of domestic violence that occurred in October 2006. The record does not reflect that defendant filed any opposition to the motion. At the hearing on the motion, defense counsel commented on several occasions regarding the admissibility of other evidence the People sought to introduce at trial. Regarding the October 2006 incident, the court concluded: "I think that clearly is [Evidence Code section] 1109 evidence, and it's recent enough, it seems to me. And, also, it does strongly explain her motive. And there's a different policy for prior acts of domestic violence, and so it's allowed in." Defense counsel responded, "Yeah, the issue I have is if other things were potentially to come up, I haven't been given notice. I just want to limit to that one prior incident." Later, in the middle of trial, the court announced on the record, outside the presence of the jury, "All right, Counsel, I think we were discussing

the issue of whether the 2006 incident of domestic violence should be allowed in. Before the break, you were objecting." Defense counsel replied, "No. That one I didn't have a problem with, the October one. It was anything other than the October one." By specifically acquiescing to the admission of evidence regarding the October 2006 incident, defendant has waived or forfeited his claim on appeal.[3] (Evid. Code, § 353; See *People v. Hinton* (2006) 37 Cal.4th 839, 893, fn. 19.) Nevertheless, we shall address the merits of his contention.

"Under Evidence Code section 1109, evidence of a prior act of domestic violence is admissible to prove the defendant had a propensity to commit domestic violence when the defendant is charged with an offense involving domestic violence." (*People v. Rucker* (2005) 126 Cal.App.4th 1107, 1114.) However, the trial court has the discretion to exclude any such evidence under Evidence Code section 352 if it is more prejudicial than probative. (*Rucker*, at p. 1114.)

We begin with the fundamental premise that evidence of prior misconduct is admitted in the trial court's discretion (*People v. Lewis* (2001) 25 Cal.4th 610, 637), and that we are enjoined not to disturb a ruling admitting such evidence unless the trial court "exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice [citation]." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.) Evidence of past acts may also be admissible to prove that defendant

---

[3] The term "waiver" is used "'loosely to describe two related, but distinct, concepts: (1) losing a right by failing to assert it, more precisely called forfeiture; and (2) intentionally relinquishing a known right.'" (*Applera Corp. v. MP Biomedicals* (2009)173 Cal.App.4th 769, 791.)

had the same intent when he committed the charged crime: "The least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent." (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402, superseded by statute on other grounds as stated in *People v. Britt* (2002) 104 Cal.App.4th 500, 505; see also *People v. Kipp* (1998) 18 Cal.4th 349, 371.) "In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to support the inference that the defendant '"probably harbor[ed] the same intent in each instance." [Citations.]' [Citation.]" (*Ewoldt*, at p. 402; *People v. Ramirez* (2006) 39 Cal.4th 398, 463.)

Nevertheless, evidence of prior misconduct is inherently so prejudicial that its admission requires extremely careful analysis. (*People v. Ewoldt, supra,* 7 Cal.4th at p. 404.) The probative value of the uncharged offense evidence must be *substantial*, and the court must carefully analyze the evidence to determine both its relevance to the disputed issue and the extent to which its probative value outweighs its inherently prejudicial effect. (*Ibid*.) "The admission of relevant evidence will not offend due process unless the evidence is so prejudicial as to render the defendant's trial fundamentally unfair." (*People v. Falsetta* (1999) 21 Cal.4th 903, 913.)

Here, we examine the asserted relevance of the uncharged offense evidence to the issues for which it was proffered. Evidence is relevant if it has a "tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) Undoubtedly, the evidence of the October 2006 incident was relevant to prove defendant had a propensity to commit acts of domestic violence, particularly as to this victim. Defendant had previously punched her in the face.

Likewise, it was relevant to prove defendant's intent to hit the victim with the flashlight when he threw it at her. The two incidents were relatively temporally proximate, occurring within four months of one another. Both involved an altercation between defendant and this victim. The victim incurred injuries during both clashes. Thus, the evidence regarding the October 2006 incident was substantially relevant both for purposes of proving defendant's intent during the current incident and his propensity for committing acts of domestic violence.

We cannot conclude on the record before us that there was any basis for excluding the prior act evidence as being more prejudicial than probative. "'"The 'prejudice' referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against defendant as an individual and which has very little effect on the issues. In applying section 352, 'prejudicial' is not synonymous with 'damaging.'"' [Citation.]" (*People v. Rucker*, *supra*, 126 Cal.App.4th at p. 1119.) The evidence of the prior act was relatively minimal; the victim never explained the context of the act. The victim merely reported that the past October, defendant had punched her, apparently only once, in the face. From this she sustained a "[s]wollen right eye and cheek, bruised right eye [that] spread to the bridge of the nose and the left eye." She did not report the incident to the police and apparently never sought treatment for her injuries. Thus, the evidence did not pose any danger of confusing, misleading, or distracting the jury and did not prove unduly time-consuming.

Defendant maintains that because the prior act involved a punch, it was "more personal and violent and reflects a rage that is not necessarily inherent in throwing an

object." He contends that someone who throws an object may not mean to hit the other, while the contrary is true of one who throws a punch. Although that is certainly one way of looking at the situation, it is not the only one. In the former incident, the victim apparently sustained only one punch resulting in injuries which did not require medical attention. In the instant altercation, defendant threw at the victim a large, foot-long, black metal utility flashlight with batteries in it, which weighed three to four pounds. The flashlight hit the victim, causing her to sustain a broken arm that required medical treatment. The fact that defendant and the victim were engaged in an argument at the time, and that defendant had previously hit the victim, make it reasonable to infer that defendant intended to hit the victim with the flashlight. Thus, the court could reasonably have concluded that the charged offense was the more egregious act. Therefore, it did not abuse its discretion in its determination that the evidence of the previous incident was not more prejudicial than probative.

B. Sufficiency of the Evidence Regarding the Flashlight as a Deadly Weapon

When a criminal defendant challenges the sufficiency of the evidence to support a conviction, the reviewing court examines the evidence to determine whether any rational trier of fact could have found the elements of the offense true beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319.) Substantial evidence is evidence that is "reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.)

"'As used in section 245, subdivision (a)(1), a "deadly weapon" is "any object, instrument, or weapon which is used in such a manner as to be capable of producing and likely to produce, death or great bodily injury." [Citation.] Some few objects, such as dirks and blackjacks, have been held to be deadly weapons as a matter of law; the ordinary use for which they are designed establishes their character as such. [Citation.] Other objects, while not deadly per se, may be used, under certain circumstances, in a manner likely to produce death or great bodily injury. In determining whether an object not inherently deadly or dangerous is used as such, the trier of fact may consider the nature of the object, the manner in which it is used, and all other facts relevant to the issue. [Citations.]' [Citation.]" (*People v. Page* (2004) 123 Cal.App.4th 1466, 1470.)

Here, the People adduced sufficient evidence of the nature of the flashlight and the manner in which it was used to sustain defendant's conviction of assault with a deadly weapon. The victim reported to several individuals that defendant had thrown at her a large, foot-long, black metal utility flashlight with batteries in it, which weighed three to four pounds. The flashlight struck her arm and, on ricochet, her face. It apparently would have struck her face directly had she not blocked it with her arms. The victim sustained a broken arm, which required treatment at the hospital that day. The treatment required the splinting and casting of her forearm and the placement of her arm in a sling. The break was bigger than a hairline fracture; it went through the entire diameter of the bone. As late as April 17, 2007, an X-ray of the victim's forearm still showed the presence of the fracture. Therefore, the evidence was sufficient to support the jury's

finding that the flashlight, as used by defendant in this instance, was a deadly weapon capable or likely of producing death or great bodily injury.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

/s/ MILLER
J.

We concur:

/s/ McKINSTER
Acting P. J.

/s/ RICHLI
J.